HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 704/2002 (M/S)

Shyam Singh

Vs

Seema and others.

Approved for reporting

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~~Not Approved for Reporting~~

Date of decision 7.8.2004.

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 704(MS) of 2002

Shyam Singh
S/o Sh. Lallu Singh
R/o Village Nagal Chittar
Tehsil- Khurja
Dist. Bulandsahar ..... Applicant/petitioner

Vs

Seema D/o Late Sh. Hub Lal
And others. .....Respondents

Counsel for the petitioner Sh. Sharad Sharma
Counsel for the respondents Sh. R.Srivastava

Dated: 7-8-2004

Hon'ble Rajesh Tandon J.

Heard Sh. Sharad Sharma learned counsel for the petitioner and Sh. R. Srivastava counsel for the respondents.

By the present writ petition the order dt. 11-7-2002 has been challenged.

Brief stated according to the case of the petitioner he entered into a matrimonial alliance with Jogindar Kaur but due to certain misunderstanding, the marriage was dissolved but the matter is pending in second appeal no. 926 of 1992 and the interim order has been granted on 4-8-1992. Petitioner has filed the suit before the Family Court on November 4, 2000 under section 11 of the Hindu Marriage Act.

According to the petitioner the marriage was to be declared null and void on account of the fact that he was never married with the respondent No.1. The notices were issued in proceeding under Section 11 of the Act in the Family Courts Act.

The petitioner has submitted that the respondent No.1 has filed her written statement. She has failed to appear and by the order dt. 10-10-2001, order was passed proceeding the suit exparte in suit No. 108 of 2000 and 17-10-2001 was fixed for exparte evidence.

Counsel for the petitioner has submitted that the suit of the petitioner was decreed on 19-10-2001 and the alleged marriage was declared null and void.

The respondent No.1 has moved an application under order 9 Rule 13 of the Code of Civil Procedure on 12-11-2001 for setting aside the exparte order dt. 19-10-2001. The respondent has alleged that between 9-10-2001 to 24-10-2001, she was ill and therefore the exparte order was sought to be set aside.

Family Court Haridwar has passed the order dt. 11-7-2002 restoring the order dt. 19-10-2001.

Counsel for the petitioner has submitted that on the earlier occasions, the order were passed to proceed exparte and therefore no application under order 9 Rule 13 of the Code of Civil Procedure was maintainable. Once the order dt. 19-10-2001 has been recalled by which the exparte decree was passed, the orders passed earlier during the progress of the case will automatically revive and as such the application for restoration having been allowed, I see no reason to interfere with the restoration order under Article 226/227 of the Constitution of India.

The argument that no appeal was maintainable, suffice it to state that the respondent has available with her the remedy of filing the application for restoration as well as regular appeal against the exparte decree and as such the application under order 9 Rule 13 of the Code of Civil Procedure having been

entertained and is allowed, I find no reason to interfere under Article 227 of the Constitution of India.

The application for restoration under Order 9 Rule 13 was registered as miscellaneous case No. 88 of 2001 which was dismissed by the Family Court on 8-3-2002. Again the respondent No.1 after getting the knowledge of dismissal order of her application under Order 9 Rule 13 has filed an application for recalling of the order dt. 8-3-2002, the Family Court Hardwar by the impugned order dt.11-7-2002 has recalled the order dt.19-10-2001 and restored the matrimonial case.

After hearing the argument of the parties at length, in my opinion, since the respondent has sufficiently explained her ailment from 9-10-2001 to 24-10-2001 the restoration has been rightly allowed.

So far as the maintability of the application under order 9rule 13 read with section 51 of the Code of Civil Procedure is concerned, suffice it to state that the orders dt. 10-10-2001 17-10-2001 have merged in the order dt. 19-10-2001 and the ex-parte order having been restored by way of application under order 9 rule 13 of the Code of Civil Procedure, the petition under Section 11 of the Hindu Marriage Act shall be heard on merits.

So far as maintainability of appeal under order 43 Rule 1 (D) of the Code of Civil Procedure is concerned both the remedies are available either she may prefer an appeal or she may file restoration application. There is no merit in the said argument.

The Apex Court in the case N. Balakrishnan v. M Krishnamurthy Supreme Court & Full bench Rent Cases, 1998 page 427 held as under:

> *"Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The alw of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period to time.*
>
> *It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack to mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean*

against acceptance of the explanation. While condoning the delay, the court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the party of the applicant, the court shall compensation the opposite party for his loss."

The need of society is that there should be justice-oriented approach and the appeal should not be rejected only on the ground of technicalities. The Apex Court had held in (2001) 8 SCC 151, M.S. Grewal vs. Deep Chand Sood as under:

"Law Courts will lose their efficacy if they cannot possibly respond to the need of the society- technicalities there might be many but the justice-oriented approach ought not to be thwarted on the basis of such technically since technicality cannot and ought not to outweigh the course of justice."

The learned Judge concerned has passed the order after consideration the illness of the petitioner from 9-10-2001 to 24-10-2001. However, he has also considered that an application was dismissed in default on 8-3-2002 and the petitioner was prevented from appearing due to the fact that she suffered injuries. Both the grounds are sufficient to allow that restoration application and hearing of the case on merits.

However, I find no infirmity in the order passed by the family judge . Principle Judge family Court Judge, District Haridwar is directed to proceed with the trial of the original suit expediously within a period of 4 months after filing of the certified copy of the order.

Subject to the aforesaid observation, the writ petition is dismissed. No order as to costs.

Dated: 7-8-2004 **(RAJESH TANDON J.)**

M.K.